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VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141*

Dear Ms. Dortch:

Raw Bandwidth submits this written ex parte letter to further address certain claims made by Petitioner and its supporters with respect to the pending forbearance petition.

USTelecom's Claim That Broadband Internet Access is Irrelevant To a 251(c)(3) Competitive Analysis is Wrong as a Matter of Law

I write firstly to correct a repeated misstatement of law made a number of times by USTelecom, which is essentially that the provision of broadband Internet access by competitive providers cannot be considered as part of the competitive-needs basis for continued access to UNEs under §251(c)(3) of the Act. This claim misrepresents the

relevant state of the law, and may flow from a misunderstanding on their part of the Supreme Court's Brand X decision from 2005.

For example, USTelecom in their Reply Comments at page iii (filed 9/5/2018) claims:

> The Commission also should reject the claims of CLECs who purport to require UNEs for the provision of broadband Internet access, which is an information service. Section 251(c)(3), on its terms, establishes unbundling for the provision of telecommunications services; while CLECs providing telecommunications services using UNEs may also provide information services, the provision of such offerings cannot be the basis for maintaining unbundled access.

Again in footnote 4 on the first page of an Ex Parte letter filed May 6th, 2019, USTelecom claims:

> While commenters have expressed concerns that the unavailability of UNEs would impact the ability of some companies to provide broadband service, USTelecom notes that that Section 251(c)(3) on its face only allows unbundling for the provision of telecommunications services and not for the provision of information services alone. As the statute requires, an ILEC “shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services." Broadband internet access service is an integrated information service. Thus, arguments that certain UNEs are necessary for the provision of broadband service alone must be rejected. [continues]

National Cable & Telecommunications Ass'n v. Brand X Internet Services ("Brand X") was decided by the Supreme Court in 2005 (545 U.S. 967) to resolve whether cable companies offering cable-modem based Internet access services were required by the Telecom Act of 1996 to split out and offer at wholesale to competing Internet service providers the transmission component used to connect from the end user's customer premise to the Internet access provider's network ("basic transmission" under the Commissions' Computer Inquiry rules), so that the Internet access provider could provide its own Internet connectivity to a retail end user customer at the premise.

At the time, FCC rules required ILECs to unbundle their DSL transmission and allow competing Internet providers to purchase built-up DSL transmission to connect from the third-party Internet access provider's network to end user customer locations.

What this claim by USTelecom ignores is that the transmission service used to carry Internet access, including a DSL transport service, can be offered by a CLEC (as well as ILECs) to Internet access providers (including its own affiliate) as either a "telecommunications service" under the Act's definition, or as a non-common carrier service, in the CLEC's discretion. That the ultimate service offered to the retail customer with Internet access bundled in (as it is typically sold to the end user) is an "information service with embedded telecommunications" as was found by the Supreme Court in the Brand X case, does not determine whether the DSL transmission component (or any other flavor of wholesale transmission) embedded in the ultimate retail Internet access product was sold to the Internet access provider as a "telecommunications service" or not. I will explain further by discussing the Brand X decision and the Commission's subsequent actions with the Broadband Order (FCC 05-150).

The key Supreme Court findings in Brand X for purposes of this discussion were:

1. The FCC was entitled to deference for the FCC's conclusion that, *from the perspective of the end user purchasing a singular retail Internet access service bundled with the transmission componet*, cable modem based internet access is an "information service" that offers Internet access "via telecommunications" but is not itself a "telecommunications service" as defined by the Telecom Act.
2. That the transmission component of Internet access would only be a "telecommunications service" under the Act's definitions if offered as a common carrier service separately from the Internet access that ultimately is carried on top of it.
3. That nothing in the Telecom Act itself required this separation and common carrier offering, so unless some other rule required it, cable modem companies were under no requirement to separate out and make a "telecommunications service" offering of the basic transmission component of their cable modem

Internet access service. With respect to DSL, such separation and offerings were required by the FCC's Computer Inquiries rules then still in effect, but no such rule had been imposed on cable modem service.

With Brand X decided, the Commission was free to go either way with respect to wholesale of the transmission services embedded in retail broadband Internet access products. It could have harmonized treatment of DSL and cable modem service by imposing the same Computer Inquiries rules on cable modem service, forcing cable companies to unbundle the basic transmission component of their cable modem Internet access service, and offer the transmission component to competing Internet access providers. Instead, the Commission chose to remove the DSL unbundling requirement from ILEC DSL with the Broadband Order (FCC 05-150).

Important to understand about this discussion so far is that what is an "information service" and not a "telecommunications service" under the Commissions' interpretation of the Telecom Act, adopted by the Supreme Court, is solely about the retail Internet product bundled with the transmission component as typically sold to the retail end user, ie. from the end user's perspective it is an "information service." The Brand X decision does *not* say that the transmission component embedded in that retail product can never exist as a "telecommunications service" sold to the Internet access provider who ultimately puts together and sells the retail product. And neither has the Commission said that. We can clearly see this by looking at what the Commission subsequently did via the Broadband Order...

The Broadband Order (FCC 05-150) expressly acknowledges that the transmission component of broadband Internet access service may be offered as a "telecommunications service" under the Act. The caption of the section V.C(1) beginning with ¶87 says it clearly:

> "Wireline Broadband Internet Access Service Providers May Offer Transmission Service on a Non-Common Carrier Basis or a Common Carrier Basis,"

the latter of which is a "telecommunications service" as defined by the Act. ¶90 of the Broadband Order grants permissive detariffing for common carrier offerings, and expressly uses the Act's "telecommunications service" terminology. And nothing about the Order limits itself to existing common carrier offerings, it is a regime for any elective offering of "telecommunications service" broadband transmission utilized in retail Internet access services going forward. And ¶102 et seq. of the Broadband Order discuss the regulatory classification of broadband transmission including the fact that a carrier may elect to offer it as a statutory "telecommunications service". Of note, many companies offering retail Internet service are structured like Raw Bandwidth: a legal entity with CLEC status selling transmission wholesale to a separate corporate affiliate or parent ISP.

Put simply, USTelecom is wrong on the law when it tries to claim summarily that broadband Internet access never involves a "telecommunications service" that CLECs may implement using in part §251(c)(3) UNEs and serve as statutory justification for their access to those UNEs. Petitioner has provided no evidence as to how (common carrier "telecommunications services" or otherwise) CLECs are providing DSL transmission and other basic transmission for Internet access built-up using in part UNE components, to their own affiliate Internet access providers or to others; even if Petitioner had done so, to the extent CLECs would have to convert their broadband transmission to common carrier services in order to retain access to UNEs, the Commission should assume they would do so. USTelecom as Petitioner bears the burden of proof and its suggestion to just ignore and not consider CLECs' use of UNEs to implement components of broadband Internet access should simply be ignored, as it is based on a misstatement of the law.

USTelecom's Makes Unsupported, Speculative Claims With Respect To The Effects On Competitive Service Viability

In the October 15, 2018 Ex-Parte letter filed by AT&T Services. Inc., AT&T claims that it "intends to start reaching out to wholesale customers as early as November

[2018] to begin discussions" about commercial replacement for UNE products, including 2-wire loops. To date, more than eight months later, with the deadline approaching for a Commission decision on the Petition in 36 days, Raw Bandwidth has heard not one single word from AT&T about a commercial 2-wire loop offering, has received not one letter nor email, no proposals, no summary of anything other than the vague claims of AT&T about a coming commercial offering filed generally in this Docket.

In USTelecom's 5/28/19 Ex Parte letter, on page 2, USTelecom asserts: "Notably, no CLEC has identified any specific markets they would be forced to exit following grant of forbearance. Thus, their real complaint is not that consumers will be harmed, but that the CLECs might incur higher costs if forced to pay market-based rates for their inputs." Notwithstanding the fact that it is USTelecom's burden as Petitioner to show that forbearance is not necessary for competition, USTelecom appears to be equating consumer harm only with a CLEC's exist from a market, as well as pretending that consumers won't face higher costs as a result of CLECs costs rising. This is nonsense.

Firstly, without knowing what a CLEC is going to pay for elements that are today 251(c)(3) UNEs post-forbearance, it is impossible for a CLEC to determine its exact response to the cost increase, let alone determine the markets it would have to exit. But exiting a market entirely is not the only way that consumers would be harmed. Consumers will undoubtedly face price increases on at least some products in some markets if even small price increases on UNEs are granted. Raw Bandwidth, for example, prices its slowest residential DSL product[1] at $29.95/mo. This price-point was determined to be the lowest price we could offer service using a UNE loop, considering cost of the loop and all our other costs to implement the service, and any increase in the UNE loop cost will most certainly provide upward pressure on this price point. Most CLECs will decline to offer a service on any sort of long-term basis when they are losing money on that service, so prices will almost certainly rise on any service where the profit

[1] In areas where it must use a UNE dedicated to the customer to serve them. We have a $19.95/mo offering in our special project locations, where we backhaul on-site DSL equipment using UNEs only indirectly for backhaul and not dedicated to a particular end user.

would be wiped out at current retail pricing, and that will impact consumers. In some cases, retail service prices impacted because of UNE price increases may rise sufficiently enough that the CLEC's loss of customers for that particular product ultimately causes the product to no longer be viable in the market, removing a competitive offering and that product's impact on constraining other competitors retail pricing. CLECs also incur fixed and common costs for collocation in central offices that cannot be avoided if some products are lost or become impossible to continue offering at competitive prices, further increasing costs on remaining products that have to take up and cover a larger share of these unavoidable common costs. And while dark fiber transport forbearance is off the table for now with USTelecom's recent withdrawal of that portion of the Petition, Raw Bandwidth in our opening comments filed 8/7/2018 on page 15 stated that we would almost certainly have to end service to at least half of the eighteen central offices we are collocated in, all of the Tier 3s, if forbearance were granted with respect to the dark fiber transport UNE. Price increases on UNE loops would harm our competitiveness in every central office we are collocated in.

USTelecom hasn't actually calculated the effect on competition of raising the cost of what are currently TELRIC priced UNE inputs, and it's impossible for anyone to make any sort of detailed attempt to understand the implications because we don't know what these costs would rise to. To make matters worse, the monthly cost of the UNE is just one part of the cost; policies related to UNEs and any commercial replacement also impact overall costs, including installation cost, maintenance costs (including risk that a no-trouble-found dispatch could result in higher costs than currently), and risk that a monthly price may increase on short notice, and none of the policies with respect a proposed commercial offering have been detailed in any meaningful way with an actual proposal.

In AT&T's June 12th, 2019 letter responding to Sonic's May 28th, 2019 reply comments, in the third full paragraph on page 6, AT&T continues mixing up the cost of UNEs with the total costs of providing the service, by pointing to the price of a TELRIC-priced component UNE, and ignoring all of Sonic's other costs of producing the service,

something USTelecom did in the Petition with their broken Gross Margin calculations as I pointed out in Raw Bandwidth's Opening Comments (filed 5/7/18, page 16 et seq). AT&T then, by comparing this one UNE component cost to Sonic's published retail service pricing, summarily claims that Sonic could maintain its existing retail prices even with commercially negotiated UNE pricing. Incidentally, they didn't even get the UNE components right; I checked the footnoted 51 Ruth St, 94112 address on Sonic's website, and the service with the $50/mo introductory priced offered is Sonic's 2-pair bonded service, which requires two UNE 2-wire loops, not one, to implement. Sonic's pricing for single-line service are typically $20/mo less than what they charge for 2-pair bonded service, which checks with the $30/mo introductory price offered by their website for the 51 Ruth St. address.

We don't know what the commercial replacement for loop pricing would be. We don't even know what Sonic's existing profit margins are, factoring in all the actual costs of service. AT&T simply has no basis to claim whether or not Sonic could continue the products as-is, or have to raise pricing. That Sonic would feel cost pressure to, and possibly be forced to, increase its retail prices in response to any component UNE price increase, is obvious economically. To claim otherwise without even establishing with any particularity how much of a price increase Sonic would face for its UNEs, is laughable, and should be ignored. Any retail price increase affects consumers directly, and negatively affects the competition that benefits consumers because it removes downward price pressure between retail competitors in the marketplace.

2-Wire UNE Loops are a Natural and Actual Monopoly, and Need Continued TELRIC Rate Regulation

As Raw Bandwidth has emphasized in this proceeding, 2-wire loops are a natural monopoly, and an actual monopoly in any given location. CLECs do not have any competitive options to replace these loops, and no competitors will enter the market for this element for any reason even if forbearance were granted. CLECs have invested in collocations and broadband equipment in good faith. To the extent 2-wire loops are unavailable or excessively priced, their investment would become stranded.

In Verizon's letter dated 6/26/2019, Verizon describes a number of retail customer migration scenarios. I note in its Scenario 4, Verizon suggests migration from CLEC provisioned Ethernet over Copper or DSL (using a CLEC's own collocated broadband equipment) to a built-up offerings of Verzion, rather than using non-UNE commercially offered 2-wire loops that Petitioner and its members have claimed would continue to be available at some higher price. Does Verizon not intend to offer 2-wire loops under commercial agreements? Do they intend to price those loops so high that no CLEC would find them viable to continue using their investment in Central Office collocations and equipment, and abandon their sunk costs?

AT&T in their separate letter dated and filed 6/26/2016 effectively admit their their request for forbearance from §251(c)(3) and §251(c)(4) is all about raising costs on CLECs, squeezing CLEC profits and competitiveness by driving up CLECs ability to price-compete in the retail marketplace. AT&T's admits that provisioning systems will be the same in order to say migration won't be a hassle for CLECs and their end users, while claiming that the UNE regime is costly for ILECs when nothing will actually change other than higher prices.

AT&T's 6/26/2019 letter on page 3:

> Notably, carriers' transition from UNEs or resale to commercially available TDM alternatives will be even simpler than transitioning to an IP-based service. For

> example, the transition from a DS0 UNE loop to a commercially negotiated DS0 loop replacement product will be nothing more than a notation in AT&T's billing systems.

The notation: "Charge this one at the monopoly price."

ILECs have competitive incentive, if allowed, to squeeze out all profits from CLECs, for CLECs and their ISP affiliates to raise retail pricing harming consumers directly, and to drive competitors out of the market also harming consumers and competition. The Commission should not give its blessing for them to do that, and instead leave the UNE regime untouched and stay the course on requiring ILECs to actually deploy fiber in order to win copper retirement.

Respectfully submitted,

/s/ Michael S. Durkin

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